Most Negative Treatment: Distinguished
Most Recent Distinguished: Liberty Mutual Insurance Co. v. Fernandes | 2005 CarswellOnt 4517, 30 C.C.L.I. (4th) 267, 78 O.R. (3d) 391, [2005] O.J. No. 4015, 142 A.C.W.S. (3d) 670 | (Ont. S.C.J., Sep 22, 2005)

2005 CarswellOnt 6372
Ontario Superior Court of Justice

Royal & Sunalliance Insurance Co. of Canada v. Di Pietro

2005 CarswellOnt 6372, [2005] O.J. No. 6054, 33 C.C.L.I. (4th) 45

Royal & Sunalliance Insurance Company of Canada, Plaintiff and Roberto Di Pietro, Defendant

Spies J.

Heard: May 20, 2005
Judgment: June 8, 2005
Docket: 04-CV-266441 CM2

Counsel: Nestor E. Kostyniuk for Plaintiff
Howard Blitstein for Defendant

Subject: Civil Practice and Procedure; Insurance

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Insurance

XII Automobile insurance
XII.5 No-fault benefits
XII.5.e Disability benefits (loss of income payments)
XII.5.e.iv Long term disability
XII.5.e.iv.A "Total and permanent disability"

Remedies

II Injunctions
II.2 Availability of injunctions
II.2.b Prohibitive injunctions
II.2.b.ii Interim and interlocutory injunctions
II.2.b.ii.B Miscellaneous

Headnote

Injunctions --- Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — General

Insured was injured in motor vehicle accident — Insurer paid insured weekly income replacement benefits of $400 for period of 104 weeks pursuant to statutory obligation — Insurer notified insured of stoppage of weekly benefits on basis that he was working and no longer qualified for income replacement benefits — Assessment concluded that insured continued to suffer complete inability to engage in any employment for which he was reasonably suited by education, training or experience — Insurer brought action for declaration that insured did not meet

definition of disability as set out in Statutory Accident Benefits Schedule-Accidents on or after November 1, 1996 (SABS) and that it was not required to pay ongoing income replacement benefits — Insurer brought motion for injunction in its favour, restraining it from continuing to pay income replacement benefits pending determination of insured's entitlement to such benefits at trial — Motion dismissed — Insurer submitted that there was strong evidence, including surveillance evidence, that insured was employed as chef — Injunction is clearly not remedy that party can seek to obtain for its own benefit — Statutory obligation on insurer pursuant to s. 37(5) of SABS to pay benefits pending resolution of dispute was clear — To relieve insurer of obligation to pay benefits pending trial, merely because it can establish that there is serious issue to be tried, would clearly be contrary to insurer's statutory obligations and intent of s. 37(5) — Refusal to grant injunction would not cause significant harm to insurance industry and set "troublesome precedent" — Insurer had not established that it would suffer irreparable harm or that balance of convenience favoured granting of injunction — Injunction was neither appropriate remedy nor "resolution" that would relieve insurer from continuing to pay benefits pending trial.

Insurance --- Automobile insurance — No-fault benefits — Disability benefits (loss of income payments) — Long term disability — "Total and permanent disability"

Insured was injured in motor vehicle accident — Insurer paid insured weekly income replacement benefits of $400 for period of 104 weeks pursuant to statutory obligation — Insurer notified insured of stoppage of weekly benefits on basis that he was working and no longer qualified for income replacement benefits — Assessment concluded that insured continued to suffer complete inability to engage in any employment for which he was reasonably suited by education, training or experience — Insurer brought action for declaration that insured did not meet definition of disability as set out in s. 5(2) of Statutory Accident Benefits Schedule-Accidents on or after November 1, 1996 (SABS) and that it was not required to pay ongoing income replacement benefits — Insurer brought motion for injunction in its favour, restraining it from continuing to pay income replacement benefits pending determination of insured's entitlement to such benefits at trial — Motion dismissed — Statutory definition for entitlement to benefits changes after 104-week period to "complete inability to do any occupation" — Insurer submitted that evidence, including surveillance evidence, established that insured was still working as chef — Injunction is clearly not remedy that party can seek to obtain for its own benefit — Statutory obligation on insurer pursuant to s. 37(5) of SABS to pay benefits pending resolution of dispute was clear — To relieve insurer of obligation to pay benefits pending trial, merely because it can establish that there is serious issue to be tried, would clearly be contrary to insurer's statutory obligations and intent of s. 37(5) — Refusal to grant injunction would not cause significant harm to insurance industry and set "troublesome precedent" — Injunction was neither appropriate remedy nor "resolution" that would relieve insurer from continuing to pay benefits pending trial.

Table of Authorities

Cases considered by *Spies J.*:

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

Tobacco Products Control Act, R.S.C. 1985, c. 14 (4th Supp.)
Generally — referred to

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8
Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, O. Reg. 403/96

Generally — referred to

s. 5(2) — considered

s. 5(2)(b) — referred to

s. 37(5) — considered

Words and phrases considered

injunction

The granting of an injunction is an equitable remedy and sparingly granted by the courts. . . . In my view an injunction is clearly not a remedy that a party can seek to obtain for its own benefit.

resolution of the dispute

A "resolution of the dispute" [in s. 37(5) of the *Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996*, O. Reg. 403/96] contemplates a final decision on the merits (or as a result of a settlement) . . . .

MOTION by insurer for injunction restraining it from continuing to pay income replacement benefits to insured pending determination of his entitlement to such benefits at trial.

***Spies J.*:**

1 The plaintiff seeks an order for an injunction in favour of the plaintiff, restraining the plaintiff from continuing to pay income replacement benefits to the defendant, pending determination of the defendant's entitlement to these benefits at trial.

2 The defendant was involved in a motor vehicle accident on December 25, 2000, resulting in certain injuries.

3 The plaintiff is the defendant's insurer. Pursuant to the Statutory Accident Benefits Schedule-Accidents On or After November 1, 1996, Ont. Reg. 403/96 as amended ("SABS"), the plaintiff, as the defendant's accident benefits carrier, paid the defendant weekly income replacement benefits in the amount of $400 from January 1, 2001, for a period of 104 weeks. These payments were made pursuant to a statutory obligation, which entitles the defendant to monthly payments if there is a "substantial inability to perform the essential tasks of that [i.e. pre accident] employment", (section 4 para. 1 of the SABS).

4 The plaintiff continued to make the weekly payments after the 104 week period, but sent a Notice of Stoppage of Weekly Benefits effective March 21, 2003 to the defendant on the basis that the defendant no longer qualified for income replacement benefits and had been working since February of 2001. In this regard the plaintiff relied on an Insurer's Examination ("IE") of the defendant, which concluded that the defendant was working and therefore did not qualify for continued benefits.

5 The statutory definition for the entitlement to benefits changes after the 104-week period to what could be considered a "total disability" requirement for payment, i.e. "complete inability to do any occupation", (section 5(2)(b) pf the SABS).

Essentially the plaintiff's position is that the evidence establishes that the defendant is still working as a chef, which was the defendant's pre-accident employment.

6 The defendant challenged the Notice of Stoppage of Weekly Benefits and as a result was assessed at a Designated Assessment Centre ("DAC") from May 14 to July 18, 2003.

7 The DAC decision, dated July 24, 2003, concluded that the defendant continues to suffer a complete inability to engage in any employment for which he is reasonably suited by education, training or experience.

8 Had the DAC concluded again the defendant, the defendant could have asked for a mandatory mediation and if unsuccessful, an arbitration to decide the issue. In this case however, it is the plaintiff, the insurer, who is unhappy with the DAC decision. The insurer does have recourse to mediation, which is a pre-requisite for commencing an action, and this was pursued in this case. A Report of Mediation was issued in February 2004.

9 Unlike an insured however, the plaintiff does not have recourse to binding arbitration and its only remedy is to commence an action. In the meantime, the insurer is statutorily obligated to continue to make the payments to the defendant, notwithstanding that it takes issue with the DAC ruling. In this case the plaintiff has complied with this statutory obligation and continues to pay these benefits to the defendant.

10 The plaintiff issued a statement of claim on April 1, 2004, seeking a declaration that the defendant does not meet the definition of disability as set out in section 5(2) of the SABS in that he is not suffering a complete inability to engage in any employment for which he is reasonably suited by education, training or experience. The plaintiff also seeks a declaration that the plaintiff is not required to pay ongoing income replacement benefits to the defendant and that the defendant is required to repay to the plaintiff those benefits that the plaintiff says the defendant is not entitled to. The plaintiff has not asked for interim or permanent injunctive relief in the statement of claim.

11 This is a very unusual case because the plaintiff is actually seeking an injunction to restrain itself from making the payment it is statutorily obligated to make, pending a trial, which will determine the issue on the merits.

12 The plaintiff argues that the usual test applied by the court when considering a request for an interlocutory injunction, namely the three-step test as set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), ought to be applied on this motion.

13 Specifically the plaintiff argues that there is strong evidence of employment, including surveillance evidence, that the defendant is employed as a chef, that as such there is a serious issue to be tried and that the issue is not frivolous or vexatious.

14 The plaintiff submits that it should be able to put a stop to the payments pending trial, as there is a high degree of probability that the defendant is not entitled to the payments. It is submitted that the DAC decision flies in the face of admissions made by the plaintiff in cross-examination, the IE and the surveillance evidence. It is submitted that I should therefore discount the DAC decision, and the affidavits filed on behalf of the defendant, particularly given that the defendant himself chose not to swear an affidavit in defence of the motion.

15 Counsel for the plaintiff also reviewed a number of decisions of Financial Services Commission of Ontario ("FISCO") arbitrators on this issue. This is where the case law emanates from, as this is where the majority of these issues are determined.

16 The position of the defendant on this issue is that he is only at the restaurant part time and although he does help out from time to time, he is not an employee and that he is not being paid and therefore is not gainfully employed. It is the defendant's position that he is still disabled. The defendant alleges that his disability is psychological not physical.

17 In the affidavit of Mildred Metcalfe ("Metcalfe"), Senior Claims Adjuster with the plaintiff, Metcalfe deposes that the plaintiff will suffer irreparable harm if the injunction is not granted, as there is no guarantee that funds would be

available for repayment should a court find that the defendant does not meet the test under section 5(2) of the SABS and is therefore not entitled to these benefits. No evidence is set out in support of this assertion. There was no cross-examination on this point.

18 Counsel for the plaintiff concedes that continuing to make the payments "won't bring the company down".

19 Metcalfe also deposes that the defendant will not suffer prejudice if the injunction is granted, based on the evidence that the defendant is currently engaged in work activities, but that is in dispute.

20 The granting of an injunction is an equitable remedy and sparingly granted by the courts. The jurisdiction of the court to grant an injunction is found in section 101 of the Courts of Justice Act which provides that it must appear "just or convenient" to do so. In my view an injunction is clearly not a remedy that a party can seek to obtain for its own benefit. Not surprisingly, counsel for the plaintiff was unable to do advise the court of a single case where a party had asked for an injunction to restrain itself from acting in a certain way.

21 The statutory obligation on the plaintiff is clear. Section 37 (5) of the SABS provides that "the insurer may dispute the obligation to pay the benefit...and, pending the resolution of the dispute, the insurer *shall* pay the benefit." [emphasis added].

22 I agree with the submissions of counsel for the defendant, that the statutory intent is clear. A "resolution of the dispute" contemplates a final decision on the merits (or as a result of a settlement), as the only recourse for an insurer is to commence an action. To relieve an insurer of the obligation to pay benefits pending trial, merely because the insurer can establish that there is a serious issue to be tried, which is a very low threshold, would clearly be contrary to the insurer's statutory obligations and the intent of section 37(5) of the SABS.

23 In my view the plaintiff's motion is misconceived. Essentially the plaintiff is seeking an order from the court now, relieving the plaintiff of its statutory obligation to continue to make the statutory payments to the defendant pending a decision at trial on the merits of the defendant's entitlement to these payments.

24 The closest case on the court's jurisdiction to grant this type of relief, that was submitted by counsel (although not relied on for this point), is in fact the RJR Macdonald case in that in that case the applicants were seeking a stay from compliance with certain proposed regulations to the Tobacco Products Control Act. The court held that it had jurisdiction to grant the relief requested by the applicants even if the request for relief was for "suspension" of the regulation rather than "exemption" from it. I note in that case however, that the interlocutory relief sought was ancillary to a larger constitutional challenge to the new legislation. The Supreme Court of Canada held that the test it set out for a stay and the test for an interlocutory injunction are the same.

25 In this case the plaintiff does not challenge the constitutional validity of the legislation. In my view the court could only grant the relief the plaintiff is essentially looking for, if the plaintiff brought a motion for summary judgment and was successful in meeting the test that applies on such motions. That is why the plaintiff seeks declaratory relief, as clearly the plaintiff could not obtain a permanent injunction at trial, even though the effect of the declarations sought would be to bring an end to the plaintiff's statutory obligation to continue to pay theses benefits.

26 It is not possible at this stage to make any findings of fact. As noted in some of the FISCO decisions relied upon by the plaintiff, a determination of the defendant's entitlement to these benefits will require an assessment of the credibility of the defendant and the weight to be given to the other evidence relied upon by the plaintiff. I therefore do not accept the position of the plaintiff that my decision to refuse to grant an injunction will cause significant harm to the insurance industry and set a "troublesome precedent" as alleged by Metcalfe in her affidavit.

27 Although in light of my finding it is unnecessary to consider the RJR Macdonald test, if the injunction analysis applied to the relief sought, there is no doubt that there is a serious issue to be tried. The defendant concedes this although he takes the position that injunctive relief is not appropriate.

28 The defendant argues in the alternative, that if the test for granting an injunction applies, the plaintiff has not established that it will suffer irreparable harm if the injunction is not granted or that the balance of convenience favours the granting of an injunction. I agree.

29 The plaintiff has not provided any evidence to support its assertion that the defendant would not the able or willing to repay any judgment. It is insufficient for a party to simply make such an assertion. In my view such an assertion does not shift the evidentiary burden to the defendant to provide contrary evidence. In addition, even if the plaintiff established that the defendant is impecunious, that would not automatically determine the motion in favour of the plaintiff, although it might be a relevant consideration (see RJR Macdonald, supra at para. 64).

30 Furthermore the balance of convenience would clearly favour the defendant, as there is no evidence that the payments from the plaintiff are not his sole source of income. This of course is on the basis that the defendant is not being paid as a chef, which is at the heart of the issue for trial. In fact an affidavit filed on behalf of the defendant attests that the defendant relies on these payments for his basic necessities of life. The plaintiff has no evidence at this stage of the action that the defendant is in fact being paid, only that he is engaged in certain activities at the restaurant.

31 In my view an injunction is neither an appropriate remedy in this case nor a "resolution" that would relieve the plaintiff from continuing to pay the benefits to the defendant pending trial. It is certainly not just to grant such a remedy in this case. Accordingly, the plaintiff's motion is dismissed.

32 Counsel for the plaintiff submits that costs be ordered in the cause. Counsel for the defendant does not agree. In my view there is no reason why the usual order, namely that costs follow the event, not apply. The defendant filed a Bill of Costs, which when added to the time spent by Mr. Blitstein who argued the motion, totals approximately $9,400. This is on a substantial indemnity basis but that is clearly not appropriate in this case. The defendant is only entitled to reasonable costs on a partial indemnity basis. I note from the Bill of Costs that counsel 6 years senior to Mr. Blitstein did most of the preparation for the motion. Clearly since Mr. Blitstein was able to argue the motion, this was unnecessary. Based on the submissions of counsel and the Bill of Costs filed, I order that the plaintiff pay to the defendant costs in the amount of $4,000 within 30 days of the date of the release of this endorsement.

Motion dismissed.

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